SUPREME COURT OF NEW JERSEY

ROBERT N. WILENTZ
CHIEF JUSTICE

313 STATE STREET
PERTH AMBOY, NEW JERSEY 08861

MEMORANDUM

TO: ALL JUDGES

FROM: Supreme Court

RE: State v. Paris, Docket No. GM-197-85

DATE: December 2, 1986

In an opinion recently approved for publication (State v. Paris, No. GM-197-85 (Law Div. May 1, 1986)), the trial court ruled that a Municipal Court judge, in passing on defendant's motion to dismiss for lack of prosecution, "should not have placed any reliance upon the advice contained" in an AOC Bulletin Letter, the Letter's advice being that Municipal Court judges should not "automatically dismiss" cases upon failure of the police officer to appear. The Bulletin Letter made specific reference to drunk driving cases.

While ordinarily this Court's only means of commenting on the opinions of other judges is through our own opinions, there may be an exception when the other court's opinion touches on practice, procedure, or the administration of justice. Our responsibility in that area is plenary and our power exclusive. That responsibility sometimes requires such comment. We have withheld comment on this case pending its final disposition.

We disagree with this particular expression in the Paris opinion. We are concerned that unless clarified by this Court, it may interfere with the orderly administration of justice.

Under New Jersey's Constitution, the Supreme Court and the Chief Justice exercise exclusive control over the administration of all courts, including Municipal Courts, and their practice and procedure. With this power goes the responsibility to assure, among other things, uniform compliance with high standards of court administration. The methods of achieving this goal vary all the way from formal rules significantly regulating practice and procedure to Bulletin Letters advising judges about common problems. The power is sometimes exercised by this Court, sometimes by the Chief Justice, and sometimes by the Administrative Director on their behalf. Conformance by the judges of this State with these rules and directives is important.

The Bulletin Letter in question was first issued in 1973 by then Administrative Director Edward McConnell during the tenure of Chief Justice Weintraub, appeared in the New Jersey Municipal Court Manual of 1977 during Chief Justice Hughes' tenure while Judge Arthur J. Simpson was Administrative Director, and again in the Municipal Court Manual of 1983. The prior publications were substantially identical to the present Bulletin Letter except for its reference to drunk driving cases. The advice was apparently thought to be needed then and, if anything, it is even more needed today given the gravity of the problems caused by drunk driving.

The Bulletin Letter addresses the problem Municipal Court judges face when the complaining witness, usually a police officer, fails to appear in court when the case is about to be tried. In view of the instances when charges, including drunk driving charges, have been "automatically dismissed," the Bulletin Letter wisely counsels the Municipal Court judge to consider various factors before dismissing the case. It suggests that some attempt be made to find out what happened and to determine whether the officer can quickly be brought to court. It notes that before dismissing the charges, "the judge should consider all factors, including the seriousness of the charge, so there is no miscarriage of justice. In appropriate cases, the judge may postpone the hearing and fix a new trial date." Finally, it tells the judge that if the case is dismissed, the judge should, in effect, determine the cause of the officer's nonappearance so that the situation can be corrected in the future; and, "when warranted, the judge may refer the matter to the County Prosecutor or the Attorney General for an investigation."

This directive, recently reissued by the Administrative Director at the direction of the Chief Justice, leaves Municipal Court judges completely free to exercise their judicial discretion as they see fit. It does not in any way impair the integrity of that court.

The Bulletin Letter is addressed to a specific problem, and deals only with that problem. Obviously, it is assumed the Municipal Court judge will continue to deal properly with other problems. There is not the slightest implication in the Bulletin Letter that defendants should not be treated with equal consideration when they have difficulty bringing their witnesses in, or that their interests are not to be considered in these matters, or that the absence of witnesses other than police is not to be weighed. We assume that every Municipal Court judge who reads the Bulletin Letter understands that in suggesting that the judge be aware of the consequences of dismissing cases in this context, it is not suggested that the judge forget the many other consequences and interests involved both in these problems and in others.

We expect that all judges will continue to do what they have done in the past: conform with the rules and directives of this Court, the Chief Justice, and the Administrative Director, and conscientiously consider all other material forwarded by us, or on our behalf -- like the Bulletin Letter. These have not compromised judicial independence in the past, and we do not expect that they will in the future.

For the Court,

Robert N. Wilentz

from the Division of State Police advising:

> ...that the State Police will gladly provide you with material regarding the prosecution's expert as you requested. We ask only that you provide us first with the same information as it pertains to the defense expert you plan to introduce at trial...Our expert will not be used as part of prosecution's case-in-chief, but rather, in rebuttal of your expert's contentions. Therefore, no report can be or will be prepared in advance.[1]

On that same date, State was provided with the report of the defendant's expert and the matter was conferenced by the Municipal Court Judge. He advised counsel that he could not grant a request for a continuance beyond December 18th, referring to certain unidentified "directives" as a reason for his refusal. He therefore scheduled the defendant's trial for 8:00 a.m. on December 18th, making the date and time peremptory. This arrangement permitted the defense expert's early appearance in the Bordentown Municipal Court while accommodating his engagement to testify in another court on the same day. The State, despite the defendant's request, has never delivered any discovery material to him except its DWI report.

Defendant appeared on December 18, 1985 at 8:00 a.m. with his expert witness. The case was called three times between 8:00 a.m. and 8:47 a.m. and no State witnesses

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[1] A response of doubtful validity.

appeared. Defendant moved to dismiss for lack of prosecution. The prosecutor advised the court that the complaining witness, Trooper Alexander, confusing his dates, thought the matter was scheduled for December 20, 1985 but that he and the State's expert could be available later in the day. He then requested a continuance to another date. Defendant objected to the continuance. He agreed to try the matter later in the day and, alternatively, to stipulate to the admission of the Trooper's report on the basis of which the defense expert could provide an opinion. The motion to dismiss was denied, the alternative offers rejected and the matter continued to January 15, 1986. The Court, in denying the motion, relied in part upon certain unidentified "guidelines".

The Prosecutor in arguing the appeal, identified these as two directives issued by the Administrative Office of the Courts ("A.O.C") and claimed that they provide authority for the denial of the motion to dismiss.

An administrative rule adopted by the Burlington County Assignment Judge requiring drunk driving cases to be tried within 60 days was discussed and enforced in State v. Potts, 185 N.J. Super 607 (Law Div. 1982). The rule, however, did not long survive. In State v. Detrick, 192 N.J. Super 424 (App. Div. 1983), the court held that speedy trial rules, not administrative rules, governed dismissals for lack of prosecution. Later, the New Jersey Supreme Court adopted its own 60-day directive for drunk driving cases. Directive

#1-84, contained in Memorandum from Chief Justice Robert N. Wilentz (July 26, 1984), is still in force and has the same effect as the Assignment Judge's directive. However, in apparent recognition of Dietrick, the directive was made subject to speedy trial rules. Consequently, it is not a consideration when addressing a motion to dismiss.

A second directive, circulated by the AOC on October 22, 1985, was set forth in the following "Bulletin Letter":

ADMINISTRATIVE OFFICE OF THE COURTS

Justice Complex - CN 037
Trenton, New Jersey

MUNICIPAL COURT
BULLETIN LETTER
#9/10-85

To the Judges of the Municipal Courts:

DISMISSALS FOR LACK OF PROSECUTION

It has come to our attention that in some instances, municipal court judges may be dismissing drunk driving cases because of the failure of the police officer to appear.

Please be advised that if the complaining witness fails to appear, the judge should not automatically dismiss the complaint, especially if the complainant is a police officer. If the defendant is in court and ready to proceed the judges should question the court clerk or municipal prosecutor as to any notice given to the complainant and an attempt to contact the complainant should be made immediately. In most instances there should be no difficulty in contacting local officers and having them come immediately to the court. Before dismissing a complaint for lack of prosecution, the judge should consider all factors, including the seriousness of the charge, so there is no miscarrage of justice. In appropriate cases, the judge may postpone the hearing and fix a new trial date.

If an officer did not appear and the case is dismissed for lack of prosecution, the judge should, in writing, so notify the Chief of Police

> or officer in charge of the State Police Barracks, or the person in charge of the particular enforcement agency and request a written explanation. If there are any problems of communication between the court and enforcement agencies regarding appearances by officers, the judge should see that they are corrected. When warranted, the judge may refer the matter to the County Prosecutor or the Attorney General for an investigation.

The Municipal Court Judge should not have placed any reliance upon the advice contained in this letter. It cannot affect the present appeal.

The Administrative Director of the Courts is appointed by the Chief Justice of the Supreme Court who is the administrative head of the court system. N.J.Const. (1947) Art. 6, Sec. 7, par. 1. Rules governing the administration of our courts are made by the Supreme Court. Id. Sec. 2, par. 3. Consequently, the Director acts as the agent of the Chief Justice and of the Supreme Court. Administrative directives issued from his office are therefore not only entitled to great respect but have binding effect with reference to management matters in the court system. Neither he nor the Supreme Court, however, can direct the exercise of judicial discretion. In our system of justice, judges act independently. They must if the court system is to maintain integrity. Canon 1 of the Code of Judicial Conduct provides:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the

> judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

In re Gaulkin, 69 N.J. 185, 192 (1976), referred to our court system as "independent of partisan political or other outside pressures of any kind. So was and is being served the interest of the people of New Jersey in an independent judiciary." The United States Supreme Court, in Bradley v. Fisher, 80 U.S. 335 (13 Wall) (1871), said:

> It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. [at 347]

The issue of independence usually arises in a setting involving an encroachment by one branch of government upon the powers of another. Here, the question is one of encroachment upon judicial independence by the administrative arm of the court system itself, but the rule can be no different. Destruction from within is as unacceptable as destruction from without.

The Director's "Bulletin Letter" trespassed upon judicial territory. It advised Municipal Court Judges how to act when deciding motions to dismiss. Such decisions are judicial decisions. State v. D'Orsi, 113 N.J. Super. 532

(App. Div. 1970), certif. den., 58 N.J. 335 (1971). Consequently, the directive must be disregarded.

Judicial reliance upon any of the directives presents other obvious constitutional problems. The instruction provided by the "bulletin letter" is markedly discriminatory. It singles out drunk driving cases for special treatment. It deals only with complaining witnesses who fail to appear "especially if the complainant is a police officer," thus providing selective treatment, not only for the State, but for particular State witnesses. Elaborate procedures are to be followed by municipal court judges when the State's witness (but only the State's witness) does not appear. In those cases, the judge is encouraged not to dismiss. The bulletin does not require the same considerate treatment of the defendant or defense witnesses. No judge may rest the exercise of his or her discretion upon so lopsided an approach. To do so would be a denial of the constitutional right of equal protection. 14th Amendment, U.S. Const.; Art. I, par. 1, N.J. Const. (1947). Wilson v. Long Branch, 27 N.J. 360 (1958) states the rule:

> The requirement of equal protection is satisfied if all persons within a class reasonably selected are treated alike. And a classification is reasonable if it rests upon some ground of difference having a real and substantial relation to the basic object of the particular enactment or on some relevant consideration of public policy. [at 377]

Obviously, the parties to a criminal proceeding are within

the same class when often important questions of adjournment are addressed.

Under the circumstances, this matter is remanded to the Bordentown Township Municipal Court for reconsideration of the dismissal motion in the light of this opinion. In the event the Judge of that court, in the exercise of judicial discretion, decides that the motion should not be granted, the imposition of financial sanctions against the State should be considered. State v. Audette, 201 N.J. Super. 410 (App. Div. 1985), in which the Appellate Division said:

> We conclude that the better course would have been to grant the State's motion for postponement, its first motion in that regard. The judge could have sanctioned the State for the demonstrable expenses defendant bore to attend the aborted hearing of November 9. Such a santion of out-of-pocket costs and expenses, if imposed by the judge, would have been sufficient in the circumstance. [at 414; citations omitted.]